

ACTION
OLL 85-3713**Office of Legislative Liaison****Routing Slip**

TO:	ACTION	INFO
1. D/OLL		X
2. DD/OLL		X
3. Admin Officer		
4. Liaison		
5. Legislation	X	
6. <input type="checkbox"/>		X
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SUSPENSE		<u>4 Dec 85</u> Date

Action Officer:	<input type="text"/>
Remarks:	<i>ACTION COMPLETE PER TELECON TO STATE OMB ON 17 DEC. 85</i>

GJ / 2 Dec 85

Name/Date

Action
OLL 35-3713

Office of Legislative Liaison
Routing Slip

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SUSPENSE

~~4 Dec 85~~
Date

Action Officer:	<input type="text"/>
Remarks:	<input type="text"/>

GJ / 2 Dec 85
Name/Date



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

December 2, 1985

SPECIAL

LEGISLATIVE LIAISON

85-3713

LEGISLATIVE REFERRAL MEMORANDUM

OLL FILE *Leg. & Int. Aff.*
Recpt # Chrono

TO: Legislative Liaison Officer-

Department of Labor
Department of Justice
Department of the Treasury
Department of Agriculture
Department of Commerce
Department of Defense
United States Trade Representative
United States Information Agency
Agency for International Development

National Security Council
Office of Personnel Mgmt.
General Services Admin.
Central Intelligence
Agency

SUBJECT: (1) State's reaction to OPM, GSA, Justice, CIA, and Defense views on the original State proposal entitled the "Diplomatic Security Act" as circulated by OMB for interagency review on October 28, 1985.

(2) State's revised draft bill entitled the "Diplomatic Security Act."

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than COB, WEDNESDAY, DECEMBER 4, 1985.

Questions should be referred to SUE THAU (395-7300), the legislative analyst in this office or to DAVE SPEVACEK (395-4580).

Ronald K. Peterson

RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosures

cc: H. Schreiber P. Hanna
R. Greene J. Barie
B. Blum B. Tuttle (Rm. 153)
R. Rettman (please coordinate within GC)

SPECIAL

United States Department of State



Washington, D.C. 20520

Shan

NOV 25 1985

Dear Mr. Miller:

The Department of State has reviewed the comments of the General Services Administration, the Department of Justice, the Central Intelligence Agency, and the Defense Department on our draft bill "To provide for the security of U.S. diplomatic personnel, facilities and operations..." and has the following responses.

GSA

The Department confirms the understandings reached in telephone discussions with GSA and agrees to the changes in the bill and analysis set forth in GSA's memorandum of November 8.

JUSTICE

With respect to the comments of the Justice Department, first, section 101 of the draft bill contains no new authority. For domestic protection it reflects in the phrase "as authorized by law", as well as in section 101(d), the present division of responsibility among agencies. Sections 125 and 126 of P.L. 99-93 contain the current authority of law referred to by this language. Section 101(b), on assistance by other agencies, does not override existing law, but, to the extent agencies may need explicit authority to provide assistance on a non-reimbursable basis, this bill provides that authority. We plan to modify section 101(b), however, to make clear that assistance is to be provided through inter-agency agreements.

As to Title II, the Inman Panel clearly did not believe that existing law and regulation are adequate to deal with accountability for overseas terrorist incidents. The

The Honorable

James C. Miller, III, Director,
Office of Management and Budget.

Attention: Ms. Sue Thau,
Legislative Reference Service Department.

-2-

agrees with the Panel. Our bill, however, does leave disciplinary action to the employing agency. Since the proceeding record under this bill is the record for the disciplinary proceeding of the employing agency, we believe it is fair for that agency to bear the hearing costs.

The members of a particular Board might, or might not, be currently serving employees. To the extent that they are not, we agree with the Department of Justice that they should be treated as Special Government employees for conflict of interest purposes.

We do not wish to expand the jurisdiction of the Board to hostage-taking incidents which do not involve serious injury, loss of life or property damage. Such an inquiry during an ongoing hostage incident could prejudice sensitive efforts to resolve the incident, and an inquiry after resolution of an incident without death, injury or property damage seems to be more than is necessary.

Since we do not know how often, if ever, a Board may be convened, or how parallel incidents might be, we prefer to rely on permanent agency staff for continuity and procedural regularity. As to protection of national security information, section 203(b) of the bill provides statutory confidentiality during Board proceedings. Once a Board finishes its work, custody of its records reverts to the State Department which will safeguard them.

The Justice Department's suggested rewording of section 203(a) on subpoenas is acceptable to us.

The Board seems to us to perform an adjudicative and operational function and therefore is not an advisory committee. However, if the Justice Department has doubts, we agree that the bill should explicitly exempt the Board from the Federal Advisory Committee Act. Should it also be exempted from the Government in the Sunshine Act?

We accept the Justice Department's suggestion of new language for section 203(a) to avoid prejudice to pending criminal investigations or prosecutions.

With respect to the exemption from the Freedom of Information Act, we believe--as did the Inman Panel--that a broad exemption is essential in order to let Boards complete their urgent work, rather than spend a lot of time and staff resources processing FOIA requests from the media, families of victims, suppliers of security equipment, and the like. Once the Board finishes its work, however, the records could revert to the Department and FOIA requests would be handled as for

-3-

other Department records. We will clarify this point in the bill. We note that there is no exemption from the Privacy Act.

Finally, as to the Justice Department's procedural concerns, as we have previously made clear, once the Board makes its recommendation to the head of employing agency, existing disciplinary laws and regulations apply. If the employee has not requested a hearing, there will be a barren record upon which to base disciplinary action. We do not think the law has to specify the details of what the notification should contain; prudent administration will dictate whatever due process requires, both at that stage and after it reaches the agency. We believe that "probable cause" is sufficiently a term of art that the Board will have adequate procedural guidance from agency or its own counsel. Since the hearing is an APA hearing, the presiding official will be an Administrative Law Judge.

CIA

The principal concern of the CIA seems to be with possible infringement on CIA's security responsibilities for its own personnel, information or activities. It is clearly the intent of the Inman Panel, with which we agree, that primacy in this area overall should be vested in the Secretary of State. We also recognize CIA's concerns for interference in its intelligence operations overseas. Section 101(a) of our bill attempts to address this kind of concern by requiring the Secretary to develop policies and programs "in consultation with other agencies having personnel or missions abroad". If this is not adequate, we could perhaps insert "foreign intelligence" in section 101(d) along with law enforcement and domestic security.

With respect to the Accountability Review Boards, we are convinced that some such provision will be attached by the Congress to any bill we send up without it, and we believe that our draft (with the revisions discussed in other parts of this letter) is more effective and provides better protection than what Congress is likely to give us if we are silent. As to CIA's specific comments, our responses follow. We think that it goes without saying in legislation that classified information would be furnished only to persons authorized to have access to it--with necessary security and other clearances. Similarly, we do not think that an ARB has to be told by law to protect national security information in its reports to Congress. Sections 203(b) and (c) illustrate our concern for confidentiality. The non-reimbursable assistance issue is taken care of by revisions mentioned in the part of this letter addressed to GSA.

-4-

We would oppose CIA's proposed section 211. We believe that there can only be one accountability review process for overseas incidents, which are almost inevitably going to effect more than one agency's operations. Since the disciplinary process would be turned over to CIA if one of its employees were found accountable, we believe that this is sufficient protection for CIA's interests. We note that section 202(a) of our bill provides for the ARB to include a member designated by the agency employing an employee who is subject to a proceeding.

Finally, the appropriation request will have to be justified in detail both to OMB and the Congress. If CIA has resource requirements in addition to amounts requested to be authorized, we would have no objection to an increase which can be justified.

Defense

While terms such as "counterterrorism" used in a statute have the meaning given to them by the legislative history, rather than the dictionary, we would object to substituting "antiterrorism" not only on that ground, but because we do anticipate some offensive measures to counter terrorism, such as diplomatic initiatives.

With respect to the classified comment about section 101(a)(4), our intent was to refer to overseas incidents, and adding the word "abroad" should resolve any problem.

With respect to the classified comment on section 103, we believe that section 102(d) with the revision suggested above under CIA takes care of the problem.

While we accept that security responsibilities must be assigned to an employee before the employee can be held accountable for such responsibilities, we do not want to tie ourselves in the bill to any particular method for doing this. We would oppose the change in section 204.

As we understand the purpose of Defense's revision of section 205(a), it is to provide that investigation of accountability of members of the Armed Forces is to be done by the military service or the Defense Intelligence Agency if the member is under command of an area military commander (our proposal) or assigned to a Defense Attache or Defense Intelligence Agency Liaison Detachment. While this would shift investigation of some members of the country team under the Ambassador from the ARB to the military, we are prepared to accept this change. While there is no explanation of the

-5-

purpose of the change, we presume that it is to assure that all members of the Armed Forces have the same procedure under the USMJ and that is how we would justify it to Congress.

With best wishes,

Sincerely,

A handwritten signature in dark ink, appearing to read "Wm Ball", written in a cursive style.

William L. Ball, III
Assistant Secretary
Legislative and Intergovernmental affairs



United States Department of State

Washington, D.C. 20520

Shaw

NOV 25 1985

Dear Mr. Miller:

The Department of State has reviewed the comments of the Office of Personnel Management on our draft bill "to provide for the security of United States diplomatic personnel, facilities and operations..." and has the following responses:

The first OPM comment is an objection to our imposing a requirement that the Director of the Diplomatic Security Service be drawn from the career SES or SFS. We think that the recommendation of the Inman Panel that this important officer be chosen from the ranks of the SES or SFS was carefully considered and should not be rejected without strong affirmative reasons. We do not believe that limiting the choice to the career SES and SFS will prevent us from obtaining the best person for the job.

The second comment is to add a reference to 5 U.S.C. 3109 in the provision for the accountability review board to hire experts and consultants. This is a useful suggestion, and we will do so.

The third comment has to do with administrative leave. OPM suggests that there may be cases when the head of agency concerned would wish to suspend without pay an employee who is subject to accountability proceedings. Here again this proposal is based upon a recommendation of the Inman Panel, and in our view the possibility of cases where an employee should be suspended without pay is too limited to justify a change.

The next OPM comment has to do with establishing a proceeding under the APA presided over by an administrative law judge (ALJ). OPM believes that this is unnecessary, cumbersome and a bad precedent. The procedure envisaged by the Inman Panel, which we have not followed, contemplated a mixed fact-finding and decisional body with authority over all employees other than members of the Armed Forces. We felt that it would be unnecessarily controversial to take the function of

The Honorable
James C. Miller, III, Director,
Office of Management and Budget.

-2-

imposing disciplinary measures away from the head of the employing agency. Nevertheless, we felt that the accountability review board should have a greater role than fact-finding, but, recognizing that the members would normally be ad hoc and have other regular duties in or out of government, we intend that the task of presiding over the formal proceeding should be delegated. In order that the board may retain meaningful control over such recommendations as may emerge from a proceeding, we believe that it is necessary to have the expertise of an ALJ to build a proper record, prepare findings of fact, and make recommendations which the board can act upon rationally and expeditiously. Because the focus of the bill is upon overseas incidents, we expect that most cases which come before the board will involve members of the Foreign Service. Since separation for cause cases come before the Foreign Service Grievance Board, which does not have ALJ's or the expertise of ALJ's, we continue to believe that our proposal is the most effective way to fix accountability on the basis of a good record and findings of fact but with appropriate due process protections. In view of the formality of the hearing, we wonder if OPM would prefer that judicial review should be at the court of appeals level, rather than district court.

OPM has some other comments on the disciplinary procedures in the draft bill. It was not our intention to require final action by an agency head under section 207(b); it would be perfectly permissible for the agency head to report that disciplinary action had been initiated in accordance with normal procedures within 30 days from receipt of a recommendation from the board. As further clarification, it was not our intention in any way to create a new disciplinary proceeding; we merely wish to establish that the record prepared for the board by an ALJ shall be used in agency disciplinary proceedings (to avoid duplication).

With best wishes,

Sincerely,



William L. Ball, III
Assistant Secretary
Legislative and Intergovernmental Affairs

UNDER SECRETARY OF STATE
FOR MANAGEMENT
WASHINGTON

November 29, 1985

Dear Mr. Miller,

I am transmitting as an enclosure to this letter a revised bill and analysis to provide for the security of United States diplomatic personnel, facilities and operations, and for other purposes.

The enclosures reflect the changes and clarifications which we undertook in response to comments from OPM, GSA, Justice, Defense, and CIA as contained in Mr. Ball's two letters of November 25, except that:

(1) Our initial proposal to insert the word "abroad" in Section 101(a)(4) was in error. That paragraph does deal with protection of foreign missions and personnel in the United States. The proper response should be that the use of the phrase "as authorized by law" in that paragraph means that we only have the authority in this area provided by other law. We do have domestic protective functions under existing law.

(2) We have expanded the scope of Section 101(d) to better reflect the concerns expressed by CIA; we believe the statutory phrase "security of foreign intelligence operations and assets", taken with the specific language in the analysis, should take care of CIA's concerns.

The revised bill also contains textual changes to reflect understandings reached with USIA and AID on their retained roles and access to resources in overseas security.

In addition, in view of the general, strong opposition to a new disciplinary proceeding under the Administrative Procedure Act, although we continue to believe that the Congress will write something if we do not, this draft omits provision for such a proceeding. Instead the bill provides for the ARB to recommend disciplinary action to the head of employing agency or military service, and that officer takes over from there, but he or she must report action taken to the ARB which reports in turn to the Secretary of State, who reports to Congress. In

The Honorable
James C. Miller, III,
Director,
Office of Management and Budget.

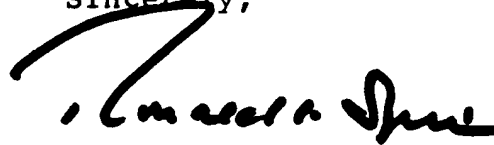
- 2 -

view of our special problems with the Foreign Service grievance process, the bill provides that actions taken as a result of ARB proceedings are not subject to that process. This means that disciplinary action short of separation for cause is within agency control (unless the particular employee has MSPB access), but separation for cause would require a hearing before the Foreign Service Grievance Board under Section 610 of the Foreign Service Act.

We note that our bill departs from the Justice Department proposal on subpoenas. Its draft was limited to subpoenas of employees, which is the case where subpoena is least likely to be necessary, so we have substituted the term "person" or "persons".

Finally, a proposed new authorization for antiterrorism research and development has been added.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald I. Spiers", written over a large, sweeping horizontal stroke.

Ronald I. Spiers

Enclosures:

As stated.

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